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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-944

TIME, INC.,
Petitioner,

v.

MARY ALICE FIRESTONE,
Respondent.

REPLY BRIEF FOR PETITIONER

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Since respondent raises jurisdictional and other contentions which lack merit, we submit this short reply.*

ARGUMENT

1. This Court has jurisdiction.

Respondent argues that the initial rejection of petitioner's federal constitutional claims in the Florida Supreme Court's decision of 1972 is final, and, since no review was sought by petitioner at that time, review is now foreclosed. This contention is clearly erroneous. That the constitutional issues raised by petitioner were directly involved and intertwined with the merits of respondent's basic claim is not open to question. In addition, as respondent singularly

*The 1974 opinion of the Supreme Court of Florida (App. C to petition) has now been officially reported at 305 So. 2d 172.

fails to note, those constitutional issues continued throughout the litigation and were not finally rejected until the Florida Supreme Court's second decision in 1974. Thus, when the Florida Supreme Court ruled adversely to petitioner on the constitutional issues in its first opinion of 1972 and remanded the case for resolution of common law issues, final judgment in the case had not yet occurred.

In that first decision petitioner's constitutional claims were rejected on the ground that petitioner's report was "not constitutionally protected as being matters of *real* public or general concern." (Pet., p. A15, italics added). At that time the test for constitutional protection was public interest, *Metromedia,* a test subsequently mooted by *Gertz.** Following the remand to the District Court of Appeal "to pass on the full merit of the remaining points raised" (Pet., p. A16), all of which had been previously decided in petitioner's favor by the District Court of Appeal, that Court adhered to its earlier decision on those points and again directed judgment for petitioner (Pet., p. B10). The Florida Supreme Court then rendered its second decision (Pet., App. C), again reversing the District Court of Appeal, and again rejecting petitioner's federal constitutional claims, this time relying on the intervening *Gertz* decision in support of the reversal—both as authority for the award of damages despite the fact that respondent had withdrawn her

*The public official test of *New York Times,* extended to public figures in *Butts,* was expanded to matters of public interest in *Metromedia.* Subsequently, *Gertz* cut back the constitutional protection for defamation of persons who are neither public officials nor public figures to the "less demanding" standard of negligence instead of the "actual malice" standard of *New York Times.*

We repeat, in this reply, for brevity and clarity the shorthand reference to First Amendment decisions of this Court utilized in the petition. We have added *Associated Press* v. *Walker,* 388 U. S. 130, *Cantrell* v. *Forest City Publishing Co.,* —U. S.—, 95 Sup. Ct. 465 and *Cox Broadcasting Corp.* v. *Cohn,* —U. S.— (No. 73-398, decided March 3, 1975).

claim for damage to reputation (Pet., pp. C6-C8), and as authority for the conclusion that petitioner's publication was "a flagrant example of 'journalistic negligence' " (Pet., p. C10). In so holding and directing entry of final judgment for respondent, the Florida Supreme Court imposed liability without fault contrary to the commands of the First and Fourteenth Amendments, as pointed out in the petition (pp. 11-15). The jurisdiction of this Court is accordingly clear since petitioner's constitutional claims, initially rejected by the first decision of the Florida Supreme Court, were again and finally rejected by the second decision of that Court. Thereby, *for the first time,* a final judgment was entered in the case, disposing of all the constitutional and other issues involved in the litigation, and satisfying the prerequisites for seeking review in this Court.*

The fact that the Florida Supreme Court considered the constitutional issues in both of its decisions makes it unnecessary to determine whether petitioner could or should have sought review in 1972 of the first decision as a "final" judgment under 28 U. S. C. § 1257. However, since the subsequent recent decisions of this Court in *Tornillo* and *Cox Broadcasting* suggest the possibility that petitioner might have been able to obtain review of the first decision, in view of the substantial claims presented under the First and Fourteenth Amendments, it is appropriate to note the following.

*Although both decisions of the Florida Supreme Court are before this Court for review, it is sufficient that this Court has jurisdiction over the second decision. The federal claims under the First and Fourteenth Amendments presented by petitioner were disposed of in that decision by the holding that petitioner was negligent and that respondent was entitled to damages under *Gertz.* Accordingly, the jurisdiction of this Court to consider the federal question in all its aspects is clear, and petitioner can advance any theories or arguments in support of the federal question even though they were not raised or considered below. *See* Stern and Gressman, *Supreme Court Practice* (4th ed. 1969), pp. 127 and 131 and cases there cited.

As this Court has recognized, "finality" is not an exact or mechanical concept and it is accordingly necessary to take a "pragmatic approach" (*Cox Broadcasting,* slip op., pp. 7, 17). Petitioner took such a pragmatic approach here. It had prevailed in the District Court of Appeal on four other dispositive points on the merits in addition to the federal constitutional question, and it expected to continue to prevail on the remand without the necessity of this Court's intervention. Indeed, petitioner did prevail again in the District Court of Appeal, and it would have prevailed in the Florida Supreme Court if that court had not mistakenly applied this Court's *Gertz* decision to support its second reversal. The *Tornillo* and *Cox Broadcasting* precedents were, of course, not available when the Supreme Court of Florida rendered its first decision in December, 1972, and the other categories in which the requirement of "finality" had been relaxed to permit review before the conclusion of proceedings in the state courts, as explained in *Cox Broadcasting,* did not apply.*

*This case does not fit into the first category discussed in *Cox Broadcasting* (slip op., p. 9), because the outcome of the further proceedings was not "preordained". As pointed out above, petitioner had previously prevailed on other dispositive points, did so again on the remand, and lost in the final decision of the Florida Supreme Court when that court continued to misapply the constitutional decisions of this Court.

Nor does this case fit into the second category described in *Cox Broadcasting* (pp. 10-11) for, unlike the cases in that category, the further state court proceedings ordered here could "foreclose or make unnecessary decision on the federal question."

The third category is also inapplicable because this is not a case "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case" (*Cox Broadcasting,* p. 11). If the further proceedings were decided adversely to petitioner, as they eventually were, its federal claims could still be brought here for review.

Nor is this case like the fourth category (*Cox Broadcasting,* pp. 12-14) where an issue separable from the merits was involved as to the forum in which the matter should proceed and "the case was for all practical purposes concluded in the state tribunals."

Moreover, it is one thing to hold that a litigant may seek early review of a state court decision because otherwise such decision "might seriously erode federal policy" (*Cox Broadcasting,* p. 13). But it is quite a different matter to hold that a litigant is precluded from review if he waits for the end of the state court litigation before bringing his federal claims to this Court. Finality is too practical a doctrine to be turned into such a trap for litigants and such an erosion of this Court's jurisdiction to pass on substantial federal claims in state court cases. Nothing in this Court's decision in *Cox Broadcasting* suggests such results. Quite to the contrary—the finality principles utilized in the *Tornillo* and *Cox Broadcasting* cases were designed to serve the constitutional guarantee of a free press by avoiding the harm involved in leaving the press "operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt" (*Cox Broadcastng,* pp. 16-17). It would be ironic, indeed, to employ these principles, which were designed to protect a free press, to cut off review of the substantial First Amendment claims presented here. Such a result is not required. Nor should it be permitted, particularly since those claims involve the very function of the press that *Cox Broadcasting* emphasizes is specially "protected"—*i.e.,* the right of the press to make accurate reports of judicial proceedings without sanction for publishing them.

2. Respondent's other contentions similarly lack merit.

a. Report of judicial proceedings.

Respondent has no satisfactory answer to our argument that review is required to protect the constitutional right of the press to report judicial proceedings—a right since emphasized by the intervening decision in *Cox Broadcasting, supra,* as entitled to special protection. The fact of the

matter is that, with a report of judicial proceedings, the standard must be "actual malice". Indeed, this was suggested by Mr. Justice White in his concurring opinion in *Rosenbloom* (403 U. S. at 61, 62):

> ". . . Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place. In the present case, for example, the public would learn nothing if publication only of the fact that the police made an arrest were permitted; it is also necessary that the grounds for the arrest and, in many circumstances, the identity of the person arrested be stated. In short, it is rarely informative for a newspaper or broadcaster to state merely that officials acted unless he also states the reasons for their action and the persons whom their action affected."

> "I would accordingly hold that in defamation actions, absent actual malice as defined in *New York Times Co.* v. *Sullivan,* the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view."

That doctrine has now been implicitly approved by this Court in *Cox Broadcasting, supra.* For that decision clearly holds (slip op., pp. 25-26):

> ". . . In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection.
>
> "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the press to inform their readers about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be put into print and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast. *See Miami Herald Publishing Co.* v. *Tornillo, supra,* at 258." (Footnote omitted.)

Respondent conveniently overlooks, among other things, the specific finding by the District Court of Appeal in its third opinion in this case that:

"The publication fairly and accurately reported the final judgment [in the divorce proceeding]" (Pet., p. B10).

Petitioner accordingly cannot be held constitutionally liable for its report of the Firestone divorce proceedings. That report was accurate and truthful.* And, even if it was in error, it was published without "actual malice".

b. Public figure.

Respondent argues, as a reason for denying the writ, that the public figure issue is being now raised for the first time. There are two dispositive answers to this erroneous argument:

First, it is completely contrary to the record. Petitioner argued public figure throughout, from the trial court to the second decision of the Florida Supreme Court.**

Second, it is immaterial whether petitioner argued public figure below. The federal question under the First and Fourteenth Amendments having been properly raised below, petitioner may urge and this Court may consider any arguments upon the federal question, for, as said in *Dewey* v. *Des Moines,* 173 U. S. 193,

*Totally aside from the rightness or wrongness of petitioner's report, it was an interpretation. Compare *Gertz,* p. 339, "Under the First Amendment there is no such thing as a false idea".

**The point was consistently presented, *inter alia,* in petitioner's pretrial statement, its requests for instructions, its motions for directed verdict and new trial, its briefs on appeal (including the extracts attached to respondent's brief in opposition—see pp. 23-24 of Appendix A and p. 32 of Appendix B to that brief which amply show that petitioner was relying on the public figure argument), and its supplemental brief, submitted to the Florida Supreme Court on the second appeal, following the decision of this Court in *Gertz.* Petitioner also submitted proof as to public figure in the form of affidavits showing the extensive prior publications regarding respondent in the *Miami Herald, Palm Beach Post* and *Palm Beach Times.* The public figure matter was also discussed in the 1971 decision of the District Court of Appeal (Pet., p. G7) and in the first decision of the Florida Supreme Court (Pet., pp. A12-A15).

198, "[p]arties are not confined here to the same arguments which were advanced in the [state] courts below upon a Federal question there discussed."

c. Liability without fault.

In arguing that the Supreme Court of Florida did not impose liability without fault, respondent erroneously relies on a supposed conflict between Delaney, petitioner's Palm Beach "stringer", and Farish, attorney for respondent, with respect to the statement in Delaney's dispatch of December 16, 1967 (Pl. Ex. 4), that the "technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery".

To begin with, there is no conflict between Farish and Delaney. Farish testified explicitly that "I said Mr. Firestone had accused her of extreme cruelty and adultery" (T. 87) and agreed that he and Delaney had discussed that "the technical grounds for divorce as alleged in the complaint were adultery and extreme cruelty" (T. 104). Once this testimony is placed in context with the clear language of the opinion and judgment which was being reported ("defendant's counterclaim for divorce be and the same is hereby granted"— T. 103) the inescapable conclusion is that the grounds upon which the divorce was granted were extreme cruelty and adultery. No amount of argument can gainsay that fact, particularly when the opinion specifically noted, as reported in Duncan's (Miami bureau head) first dispatch (Def. Ex. 2), that the "extramarital escapades of plaintiff" sufficed "to have made Dr. Freud's hair curl". There is no conflict.

Moreover, Delaney's knowledge is not pertinent to the constitutional inquiry. Precisely the same state of facts with respect to the knowledge of a reporter was presented to this Court in *Walker* in which the Associated Press

relied on its reporter in the field. In dismissing that action, despite the fact that the reporter's testimony differed from that given by plaintiff Walker so that if the reporter's knowledge were relevant there was created an issue of fact sufficient to bar judgment for defendant, this Court disregarded the reporter's knowledge and stated (388 U. S. at 158):

> "... The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. ..."

To the same effect, see *Walker* v. *Pulitzer Pub. Co.*, 394 F. 2d 800, 805 (8th Cir. 1968), and *Firestone* v. *Time, Inc.*, 460 F. 2d 712, 721 (5th Cir.), *cert. denied*, 409 U. S. 875 (1972).*

This Court's recent decision in *Cantrell* v. *Forest City Publishing Co.*, U. S. , 95 Sup. Ct. 465 (1974), further shows the fallacy of respondent's contention. There this Court held that the knowledge of the staff writer, Eszterhas, was the knowledge of his employer Forest City Publishing Company (95 Sup. Ct. p. 470) just as, of course, the knowledge of the New York editorial staff of petitioner would be implied to petitioner, for researcher Nadasdy, writer Doerner and editor Daniels were the persons "responsible for publication" (*New York Times*, p. 287). By the same token, this Court in *Cantrell* dismissed the action against photographer Conway on the ground that he "was not shown to have participated" in the editorial process (95

*The Fifth Circuit *Firestone* case was a prior action brought by Mary Alice Firestone with respect to a Life article, also published by petitioner. There, however, the Fifth Circuit, unlike the Florida Supreme Court, protected petitioner's First Amendment rights so that there was no need for action by this Court and this Court, quite correctly, denied respondent's petition for certiorari.

Sup. Ct. p. 470). Delaney is in the same posture. Since he did not participate in writing or editing the report, his knowledge will not be implied to petitioner and is immaterial to the constitutional inquiry.

In this case, the ample precautions taken by petitioner in publishing the Milestones item clearly negate any finding of "actual malice". These exhaustive precautions also clearly constitute compliance with the standard of "reasonable conduct in the light of the apparent risk"* and thus preclude any finding of negligence.

The burden is, of course, on respondent to prove that petitioner was at least negligent in the sense of the constitutional standard mandated by *Gertz*. (This point need never be reached if petitioner's "public figure" and "report of judicial proceedings" arguments are accepted.) If this were an ordinary negligence case, respondent would have to carry that burden by a preponderance of the evidence—*see, e.g., Prosser on Torts* 208-09 (4th ed. 1971). But because First Amendment rights are involved here, respondent has the burden of showing negligence with "convincing clarity". That is the burden which public officials or public figures must carry to prove the "actual malice" required by the *New York Times* rule; not only must they prove "actual malice", but they must do so with "the convincing clarity which the constitutional standard demands. ..." 376 U. S. at 285-86. The requirement of negligence which *Gertz* applies to private defamation plaintiffs, although "less demanding" than the "actual malice" requirement of *New York Times*, is also a constitutional standard and private plaintiffs must accordingly prove negligence with "convincing clarity".

Respondent cannot show that petitioner was negligent here under any standard of proof, let alone by proof of

Prosser on Torts 324 (4th ed. 1971).

"convincing clarity". The fact remains, as pointed out in the petition (pp. 11-15), that liability without fault was imposed on petitioner, contrary to the command of the First Amendment.

d. Pape.

Respondent's attempt to distinguish the decision by this Court in *Pape* is of no avail. The article involved in the *Pape* case reported on a Civil Rights Commission report in the identical way that the article involved in this case reported on a Florida Circuit Court decision, *i.e.*, Judge Knott's opinion. In each instance it was necessary that the article interpret that which was being reported on—and in each instance the article was a "rational interpretation" (*Pape*, p. 230).

e. Hill.

Respondent conveniently does not answer our basic point that, once her claim for damage to reputation was withdrawn, she stands in the same posture as plaintiff *Hill* so that the same standard must be applied, *i.e.*, "actual malice". Moreover, respondent's quotation (Br. pp. 18-19) from *Gertz* (p. 341) ignores language thereafter appearing in *Gertz* emphasizing that reputation is the protected interest—*e.g.*, "the state law right to compensation for wrongful hurt to one's ***reputation***" (p. 343), "adverse impact on ***reputation***" (p. 343), and "the legitimate state interest in compensating private individuals for wrongful injury to ***reputation***" (p. 348), as well as the statement "the strong and legitimate state interest in compensating private individuals for injury to ***reputation***" (pp. 348-49). (Emphasis has been supplied.)

CONCLUSION

For reasons stated here and in the petition, the petition should be granted.

March 6, 1975.

Respectfully submitted,

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